MOTION FILED

No. 104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, *Appellants*,

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, *Appellee*

On Appeal from the United States District Court for the District of New Jersey

MOTION OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS THAT SAID ASSOCIATION BE GRANTED LEAVE TO FILE A BRIEF AMICUS CURIAE HEREIN

BRIEF OF SAID ASSOCIATION PRESENTED WITH SAID MOTION

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October 17, 1962

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AUTHORITIES

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I

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as "NARUC", is a voluntary organization, the membership of which embraces the members of the railroad and public utility regulatory commissions and boards of all the States of the United States. The members of the Board of Public Utility Commissioners of the State of New Jersey belong to the NARUC.

By the Constitution of the NARUC its attorneys may be directed to appear on behalf of the NARUC, as distinguished from the individual commissions represented within its membership, in any proceeding pending before any court or commission in which it is felt that appearance on behalf of the NARUC should be made. This motion and the brief presented herewith are offered on behalf of the NARUC by direction of its Executive Committee in the general public interest.

On July 31, 1962, the Executive Committee of the NARUC at a regular meeting duly adopted the following resolution:

> RESOLUTION REGARDING THE CASE OF NEW JERSEY V. NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD CO.
>
> *Whereas*, An opinion of a United States District Court in *New York, Susquehanna and Western Railroad Co.* v. *United States* (200 F. Supp. 860) has held that section 13a(1) of the Interstate Commerce Act is applicable to the discontinuance of a railroad passenger train operating solely between points in a single state by reason of the fact that the train connects with an interstate bus which crosses a state line; and
>
> *Whereas*, This decision has been appealed to the United States Supreme Court; and
>
> *Whereas*, If allowed to stand, this decision will materially limit the application of section 13a(2) of the Interstate Commerce Act and further erode the jurisdiction of the states over discontinuance of passenger trains; now, therefore, be it
>
> *Resolved*, By the Executive Committee of the National Association of Railroad and Utilities Commissioners that the legal representatives of the Association are hereby authorized to participate as appropriate in the aforesaid cause in sup-

port of the position that the passenger train service in question does not come within the provisions of section 13a(1) of the Interstate Commerce Act.

II

On October 2, 1962, requests were addressed to the Attorney General of the State of New Jersey and to counsel for the New York, Susquehanna and Western Railroad Company asking the assent of each to the filing of a brief on behalf of the NARUC, *amicus curiae*, in this proceeding, in support of the appellants herein. The Attorney General of the State of New Jersey has granted the requested assent, but counsel for the New York, Susquehanna and Western Railroad Company have refused to assent.

III

Because the regulatory commissions and boards represented in the membership of the NARUC are governmental bodies of the several States of the United States and have a vital interest in any judicial interpretation of Section 13(a)(1) of the Interstate Commerce Act, and because the brief sought to be filed in their behalf is offered in the public interest of the peoples of said States, the NARUC respectfully represents that the filing of a brief, *amicus curiae*, tendered herewith in this case ought not to be prevented by the refusal of the New York, Susquehanna and Western Railroad Company to assent to such filing.

In support of this motion, the NARUC cites as precedent the decisions of this Court upon similar motions made on behalf of the state commissions in *Board of Railroad Commissioners* v. *Great Northern Railway*, 281 U.S. 412; and *Public Service Commis-*

sion of Wisconsin v. *Wisconsin Telephone Company*, 309 U.S. 657. In the *Board of Railroad Commissioners* case, the Court, upon motion, and notwithstanding the opposition of the appellee, granted leave to file a brief on behalf of state regulatory commissions, amicus curiae, indicating in the ruling of the Court, announced orally by the Chief Justice, that the motion was granted by reason of the public character of the state commissions and boards, on behalf of which said brief was offered for filing.

IV

The NARUC, accordingly, presents herewith a copy of the brief which it desires to file, and respectfully moves that it be granted leave to file the same.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

STATEMENT OF THE CASE

New York, Susquehanna and Western Railroad Company, hereinafter referred to as "Susquehanna", operates railroad passenger trains between Butler, New Jersey, and Susquehanna Transfer in North Bergen, New Jersey, entirely within the State of New Jersey. Passengers who desire to compute on into New York City are transported from Susquehanna Transfer to

the Port of New York Authority Bus Terminal in New York City by motor bus over the public highways. The motor buses are owned and operated by Public Service Coordinated Transport, unaffiliated but under contract with Susquehanna.

Purportedly acting under Section 13(a)(1) of the Interstate Commerce Act, Susquehanna on December 30, 1960, filed a notice with the Interstate Commerce Commission, hereinafter referred to as "I.C.C.", that it would discontinue all of its passenger trains described as operating between Butler, New Jersey, and New York City.

The State of New Jersey and its Board of Public Utility Commissioners, hereinafter referred to as the "Board", filed a petition with the I.C.C. praying, among other things, that Susquehanna's notice be dismissed as being improperly filed under Section 13(a)(1). The I.C.C., by its Division 4, on January 18, 1961, dismissed Susquehanna's notice for lack of jurisdiction, upon a finding that the passenger trains proposed to be discontinued operated solely within the State of New Jersey. The I.C.C. concluded that the notice was improperly filed under Section 13(a)(1). Susquehanna filed a petition for reconsideration of the I.C.C. order, which was denied by order of May 10, 1961.

Susquehanna thereupon brought action in the United States District Court for the District of New Jersey to have the I.C.C. orders of January 18 and May 10, 1961, set aside. In a divided opinion, the District Court held that the I.C.C. had jurisdiction under Section 13(a)(1). That opinion is on appeal herein.

QUESTION PRESENTED

The basic question presented herein is whether the provisions of Section 13(a)(1) of the Interstate Commerce Act, referring to the discontinuance of "a train or ferry operating from a point in one State to a point in any other State," may be construed to embrace passenger train service between points in the same State when such service is offered in conjunction with an interstate motor bus operation.

STATEMENT OF POSITION

It is the position of the NARUC that the application of Section 13(a)(1) is limited to situations involving a train or ferry operating from a point in one State to a point in another State and that single State passenger train service can not be coupled with an interstate motor bus operation so as to bring such train service within the provisions of that Section. Accordingly, the I.C.C. is without jurisdiction in this proceeding and it properly dismissed the notice filed by Susquehanna in its order of January 18, 1961.

ARGUMENT

The Provisions of Section 13(a)(1) of the Interstate Commerce Act Are Not Applicable to the Instant Case

We are not concerned here with the constitutional grant to Congress of power to regulate interstate commerce. It is plain that the States are free, insofar as the Commerce Clause is concerned, to make laws affecting interstate commerce, provided Congress has not acted to prevent such state regulation.

The Interstate Commerce Commission is a statutory body and possesses only such jurisdiction and powers as are conferred upon it by statute. It is well settled that the powers of a regulatory commission are special and limited, and it can exercise only such authority as

is legally conferred by express provision of law, or such as is by fair implication and intendment incident to and included in the authority expressly conferred, and that any reasonable doubt of the existence of any particular power in the commission should be resolved against the exercise of such power. *Backus-Brooks Co. v. Northern Pacific R. Co.*, 21 F. (2d) 4.

This is doubly true where a conflict with state jurisdiction is involved, as this Court stated in *Palmer v. Massachusetts*, 308 U.S. 79, 84:

> "In construing legislation, this Court has disfavored inroads by implication on State authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress."

The question that is controlling of the issue in this case is whether or not the I.C.C. has received a plain mandate from Congress to permit the train-bus discontinuance in question.

The issue herein, it should be made clear at the outset, is a *discontinuance of service* and not an *abandonment of a line* of railroad, provisions concerning the latter being found in Section 1(8) of the Interstate Commerce Act. That subsection was not intended to apply to curtailments or discontinuances of passenger train service, nor has it ever been interpreted to so apply. *Board of Public Utility Com'rs of N. J. v. United States*, 158 F. Supp. 98 and 158 F. Supp. 164.

For the first 71 years of the I.C.C.'s existence, it similarly held that it had no authority under Section 1(18), or any other part of the Act, to curtail or discontinue rail service. *Public Convenience Application of K.C.S. Ry.*, 94 I.C.C. 691; *Morris & E. R. Co. Proposed Abandonment*, 175 I.C.C. 49; and *Re New York*

Central Railroad Co., 254 I.C.C. 745. This was succinctly stated by the I.C.C. in *Morris & E. R. Co. Proposed Abandonment*, supra:

> "... we have no jurisdiction over a partial discontinuance of rail service. Accordingly, the part of this application which covers the proposed abandonment of passenger service and the substitution of busses therefore is not a matter which in itself we are authorized to decide." (p. 52).

It is evident, therefore, that prior to 1958 the I.C.C. was without jurisdiction over any discontinuance of passenger train service even when furnished in interstate commerce.

In 1958, limited jurisdiction in the field of train discontinuance was placed by Congress in the I.C.C. The applicable provisions of the Transportation Act of 1958 may be found in Section 13(a) of the Interstate Commerce Act. (49 U.S.C. 13a.)

Section 13(a)(1) deals with the "discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State ..." These are what might be called interstate trains or ferries.

Section 13(a)(2) deals with "the discontinuance or change, in whole or in part, ... of the operation or service of any train or ferry operated wholly within the boundaries of a single State ..." These are what might be called intrastate trains or ferries.

The procedures to accomplish discontinuance vary materially under the two subsections. Under Section 13(a)(1) a train may be discontinued upon thirty days' notice. A hearing is not compulsory. Right of appeal is limited.

On the other hand, Section 13(a)(2) requires full hearing and specific findings in order to displace state authority and permit discontinuance.

In other words, it is of major importance to the state regulatory commissions whether a proceeding is brought under Section 13(a)(1) or Section 13(a)(2).

The instant case was brought under Section 13(a)(1) as relating to a discontinuance "of the operation or service of any train or ferry operating from a point in one State to a point in any other State."

The plain meaning of this language was best enunciated by Circuit Judge McLaughlin in his dissenting opinion in the lower court when he stated:

> "The statute is a lean, lucid law. It cannot be misconstrued as it stands."

A motor bus is neither a "train" nor a "ferry". The train operation involved in this case is solely within the State of New Jersey—from Butler, New Jersey to Susquehanna Transfer in North Bergen, New Jersey. The only operation "from a point in one State to a point in any other State" is that performed by the motor bus company. The plain mandate of Congress, however, in Section 13(a)(1) is applicable only to a "train or ferry".

Further, the legislative history of Section 13(a)(1) amply demonstrates that Congress meant exactly what it said—that the section applies to trains and ferries, nothing else.

From January to April, 1958, the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce held a series of hearings on "Problems of the Railroads." Following these hearings, there was introduced in the Senate a

bill S. 3778 embracing the recommendations of the Subcommittee on Surface Transportation growing out of testimony received at the hearings.

Pertinent to the Section 13(a) amendment, S. 3778 as introduced on May 8, 1958, originally provided:

> ". . . the discontinuance or change, in whole or in part, of the operation or service of any train or ferry engaged in the transportation of passengers or property in interstate, foreign and intrastate commerce, or any of them, or the operation or service of any station, depot or other facility where passengers or property are received for transportation in interstate, foreign and intrastate commerce, or any of them . . ."

Such provision was extremely broad and admittedly would have been applicable to the relief Susquehanna now seeks. However, Congress did not enact such language. Material changes were made in the provisions of Section 13(a) during its progress through Congress.

One, the standard "transportation . . . in interstate, foreign and intrastate commerce" was deleted from the bill. Instead, the standard became "the operation or service of any train or ferry operating from a point in one State to a point in any other State." In short, Congress amended the bill to completely negate the major premise of Susquehanna's contention herein.

During Senate consideration, Senator Russell of Georgia suggested an amendment to protect state commission jurisdiction over intrastate trains. Senator Smathers, sponsor of S. 3778, replied:

> ". . . we would be perfectly agreeable, if the Senator from Georgia would accept the amendment, to offer an amendment which would state specifically that, with respect to any train which operates within a State, whose origin and destina-

> tion are within the State—that is, any train with intrastate characteristics—together with the facilities used by the train, shall be completely under the authority of the State public utilities commission, and shall not be in any way affected by the language of this particular proposal, to which the Senator from Georgia objects." (104 Cong. Rec. p. 10852).

As can readily be seen from the final language of the bill, this operational standard for jurisdiction was incorporated in the amendment.

Second, Congress further limited and made more specific the applicability of Section 13(a) during Senate consideration of S. 3778. During the debate on the floor of the Senate, Senator Neuberger offered an amendment to this portion of the bill (104 Cong. Rec. p. 10864):

> "My amendment would amend lines 6, 14 and 20 on page 6, in section 4, by inserting the word 'or' between the words 'train' and 'ferry' and striking the words 'station, depot or other facility'.
>
> "The essential purpose of the amendment is to leave these particular items under State jurisdiction, as they are at present."

Senator Smathers, sponsor of S. 3778, indicated acceptance of this amendment with the understanding that it would be perfected in conference. The Senate agreed to the Neuberger amendment (104 Cong. Rec. p. 10864).

In the House of Representatives, a companion bill to S. 3778 was introduced, namely H. R. 12832. This bill included the same language as S. 3778 regarding "station, depot or other facility," but the House Committee on Interstate and Foreign Commerce, in reporting

the bill, deleted this language. The House bill used the reference "line of railroad" as the operational standard for jurisdiction. The Committee stated:

> "Because of this delay in authorizing, or absolute refusal to authorize, discontinuance of little-used services, it is proposed to add a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than State commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single State. This limitation is contained in the bill being reported because the committee feels that the record at this time does not support the broader change in venue, requested by the railroads, which would have covered Interstate Commerce Commission jurisdiction also over operations more local in character, such as those of a branch line or other line of railroad located solely within one State.
>
> "The bill as introduced also covered the Interstate Commerce Commission passing upon discontinuance or change of the operation or service of stations, depots, or other facilities. This jurisdiction has not been included in the bill as reported, as the committee believes the record presented in its hearings does not support the need for transferring such jurisdiction from State regulatory bodies." (H. Rept. No. 1922—85th Congress, p. 12.)

In the course of the debate on the floor of the House, Congressman Harris, Chairman of the House Committee on Interstate and Foreign Commerce and sponsor of the bill, stated:

> "Further, we leave to the State commissions complete authority over intrastate operations. A

> train operating over a line of railroad located wholly within a State is within the jurisdiction of the State commission. The abandonment of stations and depots is left with State Commissions. So you can see that practically all of this problem of abandonment is continued with the State Commission, as it has been in the past. The Congress has never preempted that authority." (104 Cong. Rec. p. 12530)

H. R. 12832 passed the House in the form recommended by the Committee.

S. 3778 and H. R. 12832 went to conference and the conference report developed therein passed both the Senate and the House and became Public Law 85-625, known as the Transportation Act of 1958. The House reference to "line of railroad" was rejected and the Senate standard of physical operation from point to point across a state line was accepted. Concerning Section 13(a)(1), the conference committee stated:

> "Paragraph (1) deals with the discontinuance or change of the operation or service of a train or ferry—
>
> operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State."
> (House Rept. No. 2274-85th Congress, p. 13).

This study of the legislative history clearly indicates that Congress carefully considered the language of Section 13(a)(1) and that Congress said exactly what it intended to say by the plain meaning of the words. The section was to apply to trains or ferries—nothing else. Also, the standard for I.C.C. jurisdiction was not whether the train or ferry was engaged in inter-

state commerce, but rather whether the train or ferry operated from a point in one State to a point in any other State. Susquehanna, herein, does not qualify on either count.

The majority opinion of the lower court, herein, takes the position that to construe Section 13(a)(1) as applicable only to a train or ferry is to "thwart the apparent purpose of the Congress in adopting it." This statement is completely in error, as the review of the legislative history demonstrates. Rather than thwarting the apparent purpose of Congress, to limit the application of the section to a train or ferry gives the words their plain and obvious meaning and carries out the apparent, avowed and expressed intent of Congress when it enacted the section.

CONCLUSION

The conclusion, therefore, is that the passenger trains operated by Susquehanna operate solely within the State of New Jersey and are not within the applicability of Section 13(a)(1). The I.C.C. properly dismissed their notice for want of jurisdiction. Accordingly, we urge that the I.C.C.'s dismissal be upheld and that the judgment of the District Court be reversed.

Respectfully submitted,

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